

FULLER v EVANS

[2000] Wills & Trust Law Reports 5

JUDGMENT

MR JUSTICE LIGHTMAN: I have an application before me by the trustees of a settlement (who are the first and second defendants) for guidance as to the propriety of the proposed exercise of their power of providing for the maintenance and education of the children of the settlor (who is the claimant). The settlement dated 10 October 1986 creates accumulation and maintenance trusts for the benefit of the present and future children of the settlor. The settlor has presently two children now aged 14 and 12 years. The settlement confers on each of the settlor's children (present and future) a life interest in a share of the trust fund and after their respective deaths their shares pass to their children and remoter issue. The settlement provides for an accumulation period of 21 years commencing on the date of the settlement and makes provision for the settlor's children as follows:

‘1. Until the Beneficiary attains the [age of twenty one years] or until the expiration of the Accumulation Period (whichever is the earlier) the Trustees may pay or apply the whole or any part of the income of the Settled Share to or for the maintenance education or benefit of the Beneficiary...

2. Following the expiration of the Accumulation Period and until any Beneficiary shall attain the [age of twenty one years] the Trustees shall

apply the income of such Beneficiary's share by paying or applying it for the maintenance education or benefit of such Beneficiary.

3. Subject as aforesaid the Trustees shall stand possessed of the Settled Share and the income thereof upon TRUST to pay the income thereof to the Beneficiary during his or her life...'

Clause 12 of the settlement (so far as material) reads as follows:

'Notwithstanding anything herein expressed or implied:

(a) the Trust Fund and income thereof shall henceforth be possessed and enjoyed to the entire exclusion of the Settlor and any person for the time being the spouse of the Settlor and of any benefit to the Settlor and any spouse of the Settlor by contract or otherwise;

(b) no part of the capital or income of the Trust Fund shall be paid or lent to or applied for the benefit either directly or indirectly of the Settlor or any person for the time being the spouse of the Settlor in any manner or in any circumstances whatsoever; and

(c) no power or discretion hereby or by any variation made in exercise of the power on that behalf... by statute or the general law conferred upon the Trustees or any of them shall be capable of being exercised in such manner that the Settlor or any person being the spouse of the Settlor will or may become entitled either directly or indirectly to any benefit in any manner or in any circumstances whatsoever.'

On the divorce between the settlor and his wife, a consent order dated 10 July 1989 was made which included a provision to the following effect:

‘the Petitioner [the Settlor] do pay or cause to be paid to the Respondent [the Mother]... periodical payments

(a) for their general maintenance at the rate of 9,000 net per annum each payable monthly

(b) in such amount as is sufficient to defray their school fees inclusive of reasonable extras,

until they reach 17 years or further Order.’

The issue before me is whether the trustees may in their discretion exercise their power to provide monies out of the trust to pay for the children’s maintenance and education, though the effect of such payment may be in whole or in part to relieve the settlor from the burden of his obligations under the consent order to pay for his children’s maintenance and education. The settlor was one of the trustees of the settlement until March 1999, when quite properly he resigned to avoid any perception that any decision to which he was a party regarding the exercise of this power involved a conflict of interest and duty on his part.

This problem should be considered in two stages. The first stage is to consider what the position would have been if the settlement had not included Clause 12. In that situation in the exercise of the power in question in this case (as in the exercise of all other powers) the trustees

would be required to have regard exclusively to the interests of the beneficiaries, and could not seek by the exercise or non-exercise of the power to promote the interests of anyone else, and most particularly the settlor. It would be open to the trustees to decide that the power be exercised though the effect would be to relieve the settlor in whole or in part of his obligations under the consent order, but they could not set out to benefit the settlor by affording him relief in this way. If the exercise of the power was in the best interests of the beneficiaries, the trustees might exercise the power though the exercise incidentally relieved the settlor in whole or in part from his obligations, but they could not allow the perceived advantage to the settlor to be a factor favouring its exercise.

I turn to the situation which arises where the settlement includes Clause 12. The obligation to have exclusive regard to the interests of the beneficiaries remains the same. The question raised is whether Clause 12 precludes the trustees exercising the power where the interests of the beneficiaries require its exercise if such exercise may incidentally benefit the settlor, and in particular may relieve the settlor from the actual or perceived need because of some legal or moral obligation (in this case an obligation arising under the consent order) to do at his own cost what the trustees are willing to do at the cost of the trust.

Despite the breadth of Clause 12 (and in particular Clause 12(c)) I find it very difficult to read the settlement as paralysing the trustees in this situation, barring them from exercising the powers conferred on them merely because a by-product of their exercises is an advantage to the settlor. The power given by the settlement to apply the income for the maintenance, education and benefit of the settlor's children (and indeed the duty to do so in case of children born after the date of the settlement during the period between the expiration of the accumulation period and their attainment of the age of 21) is calculated to provide for the discharge of legal or moral responsibilities of the settlor as father during the period in question and accordingly in whole or in part to relieve him of those responsibilities.

Reading the settlement as a whole, it seems to me that Clause 12 does little (if anything) more than vigorously reaffirm the duty of the trustees to have regard exclusively to the best interests of the beneficiaries and ignore those

of the settlor. That little may be to prohibit the trustees from seeking to promote the best interests of the beneficiaries by directly or indirectly conferring benefits on the settlor. This approach is I think in accordance with the approach adopted by Lord Reid when giving the Opinion of the Privy Council in *Oakes v Commissioner of Stamp Duties of New South Wales* [1954] AC 57 at pages 72-3. The New South Wales Stamp Duty Act (which was not materially different from Section 43(2)(a) of the United Kingdom Finance Act 1940) provided that for the purposes of death duty the estate of a deceased person should be deemed to include 'any property comprised in any gift made by the deceased at any time... of which [bona fide] possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased and of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not...' The settlor in that case declared himself a trustee of his property for his four children and in exercise of his statutory powers he applied the income during their minority for their maintenance and education. Lord Reid stated that, so long as the settlor in so applying the income acted in the best interests of his children, and not in whole or in part for his own benefit, the fact that the applications of money afforded relief from what he would otherwise have had to pay out of his own monies did not bring the settled property within the deeming provision. (I should mention that Viscount Simonds in *Chick v Commissioner for Stamp Duties* [1958] AC 438 at 449 commented adversely on a passage in *Oakes* but that comment does not relate to this point.)

The language of the statute in *Oakes* and in the settlement before me are very similar, and I think that the passage in that case lends support to my conclusion that Clause 12 does not preclude the trustees from exercising the power conferred upon them by reason of any incidental (and unintended) conferment of relief on the settlor. This conclusion of course does no more than leave it open to the trustees to exercise a discretionary power to make provision for the education and maintenance of the two children out of the settlement funds. The trustees can only exercise that power if they consider that to do so is in the best interests of beneficiaries despite the existence of the consent order and the obligations of the settlor thereunder. The trustees must have regard to the obligation of the settlor to provide for the beneficiaries' maintenance and education when undertaking

the decision-making process but the existence of that obligation is no more than a consideration to which due weight must be given (consider Section 31(1)(i)(b) of the Trustees Act 1925). If the trustees reach the conclusion that it is in the best interests of the beneficiaries to make such provision out of trust funds, they are free to do so.

Cases referred to

Oakes v Commissioner of Stamp Duties [1954] AC 57 (PC)

Chick v Commissioner for Stamp Duties [1958] AC 438 (PC)

Counsel

Mrs Francesca Quint (11 Old Square, Lincoln's Inn, London WC2A 3TS, tel 0171 242 5022, fax 0171 404 0445) instructed by Thrings & Long (Midland Bridge, Bath, BA1 2HQ, tel 01225 448 494, fax 01225 319 735) for the claimant.

Mr William Vernon Westworth Norris (9 Old Square, Lincoln's Inn, London WC2A 3SR, tel 0171 405 4682, fax 0171 831 7107) instructed by Stone King (13 Queen Square, Bath BA1 2HJ, tel 01225 337 599, fax 01225 335 437) for the first and second defendants.

The third and fourth defendants did not attend and were not represented.

[Here](#) is information on how to order *Drafting Trusts and Will Trusts* and other books by James Kessler QC.



[Home](#)